

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Johnnie M. DuBose,

Plaintiff,

V.

**Michael Walsh, New Castle County Sheriff,
in his official capacity, American Business
Credit Inc., Robert K. Beste, Jr. and Maggie
Clausell**

C. A. No. 07-45***

**DEFENDANTS MICHAEL WALSH AND NEW CASTLE COUNTY'S
MOTION TO DISMISS**

Defendant Michael Walsh, in his official capacity as Sheriff of New Castle County and New Castle County by and through their attorney, respectfully move to dismiss all counts of the Complaint of Johnnie M. DuBose. The grounds for this Motion are set forth in the Opening Brief in Support of Defendants Motion to Dismiss, which is filed separately.

/s/ Michele D. Allen
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Dated: March 13, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Johnnie M. DuBose,)	
)	C. A. No. 07-45***
Plaintiff,)	
)	
)	
v.)	
)	
Michael Walsh, New Castle County Sheriff,)	
in his official capacity, American Business)	
Credit Inc., Robert K. Beste, Jr. and Maggie)	
Clausell)	

**OPENING BRIEF OF MICHAEL WALSH AND NEW CASTLE COUNTY IN
SUPPORT OF THE MOTION TO DISMISS**

/s/ Michele D. Allen
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I. NATURE AND STAGE OF PROCEEDINGS

Answering defendants Michael Walsh, in his official capacity as New Castle County Sheriff, (hereinafter “Walsh”) and New Castle County (hereinafter “the County”) adopt the nature and stage of proceedings in the initial Opening Brief of defendants.¹

II. SUMMARY OF ARGUMENT

In addition to the reasons previously stated in Defendants initial Opening Brief the Complaint should be dismissed because the Eleventh Amendment bars this action against Defendant Walsh in his official capacity within the jurisdiction of the instant Court.

Furthermore, to the extent that the County is a defendant the Plaintiff has failed to state a claim upon which relief can be granted.

III. STATEMENT OF FACTS

Defendants adopt and incorporate the statement of facts presented in the initial Opening Brief.

IV. LEGAL ARGUMENTS

A. Standard of Review

Defendants adopt the standard of review set forth in the initial Opening Brief.

B. The Court Does Not Have Jurisdiction Over This Matter As It Is Barred By the Eleventh Amendment.

In accordance with the Eleventh Amendment Federal Courts are barred from exercising jurisdiction over actions at law or equity brought by private citizens against a state or its agencies. *Shipley v. First Federal Savings and Loan of Delaware*, 619 F. Supp. 421, 434 (Del. 1985) (citation omitted). Plaintiff specifically states in paragraph ten of the Complaint that Michael Walsh is being sued only in his official capacity as Sheriff of

¹ It is unclear in the Complaint if New Castle County is a named defendant in the instant suit. New Castle County is not mentioned in the caption, but is listed as a party in paragraph seven of the Complaint.

New Castle County. When a state official is acting in his or her official capacity they are protected by the Eleventh Amendment's grant of immunity from suit in Federal Court. *Id.* (citation omitted). Defendant Walsh shall be considered an officer of the state for his actions in the instant case. *See Shipley*, 619 F. Supp. 434 (New Castle County Sheriff and Prothonotary were regarded as officers of the state in *scire facias* proceedings). At all times relevant to the Complaint Defendant Walsh was acting under the law of the State of Delaware in connection with the sheriff sale of 727 Bennett Street. *Id.* Therefore, the Eleventh Amendment bars the instant action against Defendant Walsh. *Id.*

C. The Claims Against the County Must Be Dismissed As It Seeks To Impose Liability Upon The County By Virtue of *Respondeat Superior*.

Plaintiff's Complaint fails to state any claim of action against the County. However, in paragraph seven of the Complaint New Castle County is listed as a party, although not listed in the caption of the case. To the extent the County is being sued in the instant case, the complaint must be dismissed for failure to state a claim upon which relief can be granted. A municipality such as New Castle County, however, cannot be held liable under §1983 on *respondeat superior* theories for the alleged unconstitutional acts of its employees. *Monell v. Dept. of Social Services of the City of New York*, 463 U.S. 658, 694 (1978). Rather, a municipality can only be held responsible when an official policy or custom of the municipality itself, whether made by lawmakers or those whose acts can fairly be said to represent official policy, causes a plaintiff's injury. *Id.* The Supreme Court has reaffirmed that "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of the employee." *Board of Cty. Commr's of Bryan County v. Brown*, 520 U.S. 397, 405 (1997).

Plaintiff has failed to allege any official County policy or custom that caused any injury to Plaintiff. Without more, the county cannot be liable and must be dismissed.

Moreover, should the Court find that the County is a defendant in the instant Complaint then the claims against Walsh in his official capacity should be dismissed. The claims against Walsh in his official capacity would be duplicative of the municipal liability claims asserted against the County (to the extent the Court holds the Complaint alleges any claims against the County), as suits against government officials in their official capacities are equivalent to suits against the government entity itself. *Monell* 436 U.S. at 690 n. 55. Therefore, the allegations against Walsh in his official capacity should be dismissed.

IV. CONCLUSION

It is respectfully submitted that, based upon the foregoing reasons and authority, the Complaint fails to properly allege a violation of federal law, under 42 U.S.C. §§1983, 1985, 1986 or 1988, or other federal law, and fails to state a claim upon which relief can be granted, and therefore should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

/s/ Michele D. Allen

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C. A. No. 07-45***

ORDER

AND NOW this day of , 2007, it
is hereby ORDERED AND DECREED that Defendants Michael Walsh and New Castle
County's Motion to Dismiss is GRANTED.

J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Johnnie M. DuBose,)	
)	C. A. No. 07-45***
Plaintiff,)	
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Michael Walsh, New Castle County Sheriff,)	
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Credit Inc., Robert K. Beste, Jr. and Maggie)	
Clausell)	

CERTIFICATE OF SERVICE

I, Michele D. Allen, Assistant County Attorney hereby certify that on March 13, 2007, I sent copies via U.S. Mail postage prepaid to *Pro se* plaintiff and counsel as follows as well as electronically filed the foregoing "Defendants Michael Walsh and New Castle County's Motion to Dismiss" with the Clerk of the Court using CM/ECF which will send notification of such filing to the following:

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